A **DANCOM TELECOMMUNICATION (M) SDN BHD**

v.

UNIASIA GENERAL INSURANCE BHD

B COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HELILIAH YUSOF JCA
ABDUL MALIK ISHAK JCA
[CIVIL APPEAL NO: W-02-259-2005]
C 1 AUGUST 2008

ARBITRATION: *Arbitration clause - Twelve-month time frame to refer dispute to arbitration - Whether clause contravened s. 29 Contracts Act 1950 read with s. 6(1)(a) Limitation Act 1953*

D ***INSURANCE:*** *Contract of insurance - Arbitration clause - Twelve-month time frame to refer dispute to arbitration - Whether clause contravened s. 29 Contracts Act 1950 read with s. 6(1)(a) Limitation Act 1953*

E This was the appellant's appeal against the High Court's dismissal of its originating summons for an order under s. 12 of the Arbitration Act 1952 ('AA 1952') (now superseded by the Arbitration Act 2005) for the appointment of an arbitrator to hear and determine the dispute between the parties herein. The main F issue in this appeal was the validity of cl. 14 incorporated into two contracts of insurance ('cl. 14'). Clause 14 was an arbitration clause that the parties could resort to in respect of a dispute within a 12-month period. However, the appellant referred its dispute with the respondent for arbitration some 20 months after G the respondent disclaimed liability in respect of the appellant's claim. The appellant claimed that the 12-month time frame contained in cl. 14 was void and unenforceable as it contravened s. 29 of the Contracts Act 1950 ('CA' 1950') read with s. 6(1)(a) of the Limitation Act 1953 ('LA').

H **Held (dismissing the appeal):**
Per Low Hop Bing JCA:

(1) A contract incorporating an arbitration clause, such as cl. 14, I to refer the parties' dispute to arbitration within a specified period as agreed by the parties, is a contract *sui generis*. The hallmark of arbitration is characterised by the autonomy of the parties. By way of agreement, the parties have an unfettered

choice not only to refer their dispute to arbitration and to choose their own arbitrators or umpires but also to prescribe the time frame for such reference. Their intention is to sustain the mechanism of alternative dispute resolution by way of arbitration and not court action so as to achieve speed in the hearing and the determination of their dispute. (para 22)

(2) The expression "ordinary tribunals" generally in s. 29 CA 1950 means the ordinary courts of law, as s. 29 does not render illegal any contract by which parties have agreed to refer their dispute to arbitration under the exceptions 1 and 2 thereof. Actions to be brought under s. 6(1)(a) LA 1953 are actions commenced in the ordinary courts of law and not by way of reference to arbitration. Section 6(1)(a) neither affects nor applies to the freedom of the parties to refer a dispute to arbitration by incorporating an arbitration clause in an agreement such as cl. 14. Such an arbitration clause to refer a dispute to arbitration may validly specify a period that abridges or enlarges the time bar under s. 6(1)(a). This is because s. 6(1)(a) must be read with s. 29 exception 2 CA 1950 that specifically states that it shall not affect "any law as to references to arbitration". (para 28)

(3) The validity of cl. 14 is given statutory recognition in s. 28 of the AA 1952 which vests the High Court with the power to extend the time for the purpose of referring a dispute to arbitration after the expiry of the prescribed 12-month time frame. (para 29)

(4) Clause 14 has not been rendered illegal by s. 29 CA 1950 but instead has been validated by exceptions 1 and 2 thereto. (para 33)

Per Heliliah Mohd Yusof JCA:

(1) The parties had agreed by the terms of the agreement the mechanism by which the dispute was to be resolved. The proper approach should also be that it was arguable that time limitation clauses being a beneficial feature in commercial contracts were capable of being upheld. It would enable parties to draw a time at a much earlier stage than the limitation statutes allow. (para 48)

(2) The court should resist parties going back on what they had agreed. In the present case, cl. 14 indicated that if steps were not taken within the time frame prescribed therein then the claim was deemed abandoned and shall not thereafter be recoverable. (para 49)

(3) The appellant was not in a position to resist the conditions inserted in the contract that imposed obligations on him because if he did so he would also be in a position to take advantage of his own wrong. (para 50)

Per Abdul Malik Ishak JCA:

(1) Clause 14 did not limit the time within which the respondent could enforce its right under s. 6(1)(a) LA 1953 because the appellant assured was deemed to have abandoned its right. Where one has abandoned one's right it could not be said that one's right has been limited. (para 106)

(2) Clause 14 did not prevent or prohibit the appellant from filing a civil suit. It simply made the award of an arbitrator as a condition precedent to its liability. (para 106)

(3) Clause 14 did not absolutely restrict the appellant from enforcing its right because the time limit to refer the matter to arbitration was extendable by virtue of s. 28 of the AA 1952 and it would not run counter to s. 29 of the same Act. (para 106)

(4) After the expiration of the 12-month time period the appellant should have availed itself of the statutory relief afforded by s. 28 of the AA 1952 by applying before the High Court for an extension of time to appoint an arbitrator. Unfortunately, that was not done. (para 111)

(5) The cardinal rule of construction has always been that the intention of the parties must prevail. The parties must be bound by the terms and conditions of cl. 14. The appellant could not resile from it. (para 112)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi kerana menolak saman pemulanya yang memohon perintah di bawah s. 12 Akta Timbangtara 1952 ('AT 1952') (kini diganti Akta Timbangtara 2005) bagi melantik seorang penimbangtara

untuk mendengar dan memutuskan pertikaian di antara mereka. Isu utama yang berbangkit adalah berkaitan kesahan fasal 14 yang tertera di dalam dua kontrak insurans ('fasal 14'). Fasal 14 adalah fasal timbangtara yang membolehkan pihak-pihak merujuk kepada timbangtara bagi menyelesaikan pertikaian dalam tempoh 12 bulan. Perayu bagaimanapun merujuk pertikaiannya dengan responden lebih kurang 20 bulan selepas responden menolak liabiliti berkaitan tuntutan perayu. Perayu berhujah bahawa tempoh 12 bulan yang terkandung di dalam fasal 14 tersebut adalah batal dan tidak boleh dikuatkuasa kerana bertentangan dengan s. 29 Akta Kontrak 1950 ('AK 1950') di baca bersama s. 6(1)(a) Akta Had Masa 1953 ('AHM 1953').

Diputuskan (menolak rayuan)
Oleh Low Hop Bing HMR:

(1) Kontrak yang mengandungi fasal timbangtara seperti fasal 14 bagi merujuk pertikaian pihak-pihak kepada timbangtara dalam tempoh tertentu yang mereka persetujui adalah satu kontrak *sui generis*. Mercu kepada timbangtara adalah bahawa autonomi dimiliki oleh pihak-pihak. Melalui perjanjian, pihak-pihak bukan sahaja bebas untuk merujuk pertikaian kepada timbangtara serta memilih penimbangtara atau pengadil mereka, tetapi boleh juga menetapkan had masa bagi rujukan tersebut. Tujuannya adalah untuk mengekalkan mekanisma pilihan penyelesaian pertikaian melalui timbangtara dan tidak di mahkamah, di mana ia dirasa akan mempercepatkan proses pendengaran dan penyelesaian pertikaian.

(2) Ungkapan "ordinary tribunals" dalam s. 29 AK 1950 secara amnya bermakna mahkamah-mahkamah biasa, kerana s. 29 tidak menjadikan tak sah kontrak-kontrak di mana pihak-pihak bersetuju untuk merujuk pertikaian mereka kepada timbangtara di bawah pengecualian-pengecualian 1 dan 2 di situ. Tindakan-tindakan yang dibawa di bawah s. 6(1)(a) AHM 1953 adalah tindakan-tindakan yang bermula di mahkamah undang-undang biasa dan bukan melalui rujukan timbangtara. Seksyen 6(1)(a) tidak mempunyai kesan dan tidak terpakai kepada kebebasan pihak-pihak untuk merujuk pertikaian kepada timbangtara dengan cara memasukkan fasal timbangtara di dalam perjanjian seperti fasal 14. Fasal timbangtara seperti itu untuk merujuk pertikaian kepada timbangtara boleh sahaja menetapkan masa bagi memendekkan atau memanjangkan tempoh had masa di bawah s. 6(1)(a). Ini kerana s. 6(1)(a) harus dibaca bersekali

dengan s. 29 kecualian 2 AK 1950 yang menyatakan dengan khusus bahawa ia tidak menjejaskan "mana-mana undang-undang yang berkait dengan rujukan-rujukan kepada timbangtara".

(3) Kesahan fasal 14 mendapat pengiktirafan statutori melalui s. 28 AT 1952 yang memberi kuasa kepada Mahkamah Tinggi untuk melanjutkan masa bagi maksud merujuk pertikaian kepada timbangtara selepas luputnya tempoh masa 12 bulan yang ditetapkan.

(4) Fasal 14 tidak menjadi tak sah disebabkan oleh s. 29 AK 1950, sebaliknya menjadi sah disebabkan oleh pengecualian-pengecualian 1 dan 2 di situ.

Oleh Heliliah Mohd Yusof HMR:

(1) Melalui terma-terma perjanjian, pihak-pihak telah bersetuju mengenai mekanisma yang dipakai untuk menyelesaikan pertikaian. Pendekatannya yang betul juga sepatutnya adalah bahawa ianya boleh dihujahkan bahawa fasal-fasal menghadkan masa, sebagai satu ciri bermanfaat dalam kontrak komersial, harus boleh dipertahankan. Ia akan membolehkan pihak-pihak menetapkan masa di peringkat yang lebih awal dari had masa yang dibenarkan oleh statut.

(2) Mahkamah harus menghalang pihak-pihak yang tidak melakukan apa yang telah mereka persetujui. Dalam kes semasa, fasal 14 menunjukkan bahawa jika langkah-langkah tidak diambil dalam tempoh masa yang ditetapkan di situ, maka tuntutan dianggap sebagai ditinggalkan dan tidak boleh selepas itu dituntut semula.

(3) Perayu tidak berada dalam kedudukan untuk menentang syarat-syarat yang dimasukkan ke dalam kontrak yang meletakkan tanggungan obligasi ke atasnya, kerana berbuat demikian bermakna ia dibenarkan mengambil manfaat atas perbuatan salahnya sendiri.

Oleh Abdul Malik Ishak HMR:

(1) Fasal 14 tidak boleh dikata sebagai telah menghadkan masa di mana responden boleh menguatkuasakan hak-haknya di bawah s. 6(1)(a) AHM 1953 kerana pengambil insurans perayu sendiri dianggap telah meninggalkan hak-haknya. Di mana seseorang telah meninggalkan haknya, hak tersebut tidaklah boleh dikatakan sebagai telah dihadkan.

(2) Fasal 14 tidak menghalang atau melarang perayu dari memfailkan satu guaman sivil. Ia hanya menjadikan award penimbangtara sebagai satu syarat duluan bagi liabilitinya.

(3) Fasal 14 tidak dengan secara mutlak menyekat perayu dari menguatkuasakan haknya kerana had masa untuk merujuk halperkara kepada timbangtara boleh dilanjutkan di bawah s. 28 AT 1952 di mana ia tidak melanggari s. 29 Akta yang sama.

(4) Selepas luputnya tempoh masa 12 bulan, perayu sepatutnya menggunakan relif statutori yang diberikan oleh s. 29 AT 1952 dengan memohon kepada Mahkamah Tinggi untuk satu lanjutan masa untuk melantik penimbangtara. Malangnya ini tidak dibuat.

(5) Kaedah penting pentafsiran di setiap masa adalah bahawa niat pihak-pihak hendaklah sentiasa diutamakan. Pihak-pihak hendaklah terikat dengan terma-terma dan syarat-syarat fasal 14. Perayu tidak boleh lari darinya.

Case(s) referred to:

AN Ghose v. Reliance Insurance Co & Anor [1924] AIR Rangoon 15 ***(refd)***

Baroda Spinning & Weaving Co Ltd v. Satyanarayan Marine & Fire Insurance Co Ltd [1914] AIR Bom 225 ***(refd)***

Board of Trade v. Steel Brothers & Co [1952] 1 Lloyds Report 87 ***(refd)***

Braunstein v. Accidental Death Insurance Co [1861] 1 B&S 782 ***(refd)***

Carr v. Montefiore [1864] 5 B&S 408, Ex Ch ***(refd)***

Chop Eng Thye Co v. Malaysia National Insurance Sdn Bhd [1976] 1 LNS 15 ***(refd)***

Clift v. Schwabe [1846] 3 CB 437 ***(refd)***

Drinkwater v. London Assurance Corpn [1767] 2 Wils 363 ***(refd)***

G Rainey & Anor v. Burma Fire and Marine Insurance Co Ltd [1926] AIR Rangoon 3 ***(refd)***

Girdharilal Honuman Bux v. Eagle Star and British Dominions Insurance Co Ltd [1924] AIR Cal 186 ***(refd)***

J & Wong Logging Contractor v. Arab Malaysian Eagle Assurance Bhd [1993] 1 LNS 2 HC ***(refd)***

Hirabhai Narotamdas v. Manufacturers Life Insurance Co [1912] 14 Bom LR 741 ***(refd)***

"M Eregli" [1981] 2 Lloyd's Law Report 169 ***(refd)***

Majlis Perbandaran Petaling Jaya v. JF Industrial Products and Supplies Sdn Bhd [1998] 2 CLJ 22 CA ***(refd)***

Malaysia National Insurance Sdn Bhd v. Meraslam Alafdin [1982] CLJ 300; [1982] CLJ (Rep) 223 FC ***(refd)***

MBF Insurans Sdn Bhd v. Lembaga Penyatuan Dan Pemulihan Tanah Persekutuan (FELCRA) [2007] 6 CLJ 639 CA ***(refd)***

Medical Defence Union Ltd. v. Department of Trade [1979] 2 WLR 686 ***(refd)***
New Zealand Insurance Co. Ltd v Ong Choon Lin [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC ***(refd)***
Pearl Insurance Co v. Atma Ram [1960] AIR Punjab 236 ***(refd)***
Re George and Goldsmiths' and General Burglary Insurance Association Ltd [1899] 1 QB 595 ***(refd)***
Robertson v. French [1803] 4 East 130 ***(refd)***
Ruby General Insurance Co Ltd v. Bharat Bank Ltd & Ors [1950] AIR (37) (East) Punjab 352 ***(refd)***
Scott v. Avery and Others [1843-60] All ER Rep 1 HL ***(refd)***
Simond v. Boydell [1779] 1 Doug KB 268 ***(refd)***
Smith v. Accident Insurance Co [1870] LR 5 Ex Ch 302 ***(refd)***
Stanley v. Western Insurance Co [1868] LR 3 Ex Ch 71 ***(refd)***
Stewart v. Merchants Marine Insurance Co [1885] 16 QBD 619 ***(refd)***
Tarleton v. Staniforth [1794] 5 Term Rep 695 ***(refd)***
West India Telegraph Co v. Home and Colonial Insurance Co [1880] 6 QBD 51 ***(refd)***
Yorkshire Insurance Co Ltd v. Campbell [1917] AC 218 ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 12, 28, 29
Arbitration Act 2005, s. 45
Contracts Act 1950, ss. 1(2), 29
Limitation Act 1953, s. 6(1)(a)

Contracts Act 1872 [Ind], s. 28

Other source(s) referred to:
Associate Professor Choong Yeow Choy, *Law of Limitation*, p 166

For the appellant - Dato' Cecil Abraham (Dato' Sathaburan & Sunil Abraham with him); T/n Satha & Co
For the respondent - Sreether Sundaram; T/n Murali B Pillai & Assocs

[Appeal from High Court, Kuala Lumpur; Appeal No: R2-24-11-2004]

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] On 22 February 2005, the Kuala Lumpur High Court dismissed with costs the appellant's ("the plaintiff's") originating summons which sought an order under s. 12 of the Arbitration Act 1952 ("s. 12") to appoint an arbitrator to hear and determine

the dispute between the plaintiff and the respondent ("the defendant"). This appeal is brought by the plaintiff against that decision.

Factual Background

[2] On or about February 2001, the plaintiff purchased from the defendant two insurance policies, the first being Money Insurance Policy with a coverage of RM5 million; while the second is Burglary Insurance Policy with a coverage of RM1 million (collectively, "the policies").

[3] On or about 4 February 2001 and during the currency of the policies, the plaintiff's premises at Wisma Dancom, Lot 5, Jalan 51a/227b, 46100 Petaling Jaya, Selangor Darul Ehsan was robbed, and the goods covered under the policies were stolen.

[4] The defendant then appointed loss adjuster GAB Robins (Malaysia) Sdn. Bhd ("GAB Robins") to investigate the claim. Subsequently, the defendant appointed a new loss adjuster, Afil Adjuster, in place of GAB Robins to proceed with investigation.

[5] On 3 October 2001, the defendant wrote to the plaintiff, offering to settle the plaintiff's claim ("defendant's offer").

[6] However, on 25 October 2001, the defendant appointed solicitors Messrs. Murali B. Pillai & Associates ("defendant's solicitors") to look further into the plaintiff's claim.

[7] On 9 November 2001, defendant's solicitors withdrew the defendant's offer, thereby disclaiming liability ("the disclaimer").

[8] Between November 2001 and April 2003, the plaintiff provided various documents in order to enable the loss adjuster to investigate the claim, and requested meetings with the defendant to discuss the claim under the policies.

[9] On 3 April 2003, defendant's solicitors wrote to the plaintiff stating, *inter alia*, that:

(1) The defendant maintained the disclaimer;

(2) The plaintiff had breached the terms and conditions of the policies by failing and/or neglecting:

A (a) to exercise reasonable skill and care; and

(b) to produce sufficient documentation to substantiate the claim under the policies.

B **[10]** On 1 July 2003, plaintiff's solicitors Messrs Satha & Co. ("plaintiff's solicitors") wrote to defendant's solicitors stating that the plaintiff was invoking cl. 14 in both the policies which were identically worded ("cl. 14") in order to refer the dispute to arbitration.

C **[11]** On 11 July 2003, defendants' solicitors replied, stating that the plaintiff was precluded from referring the dispute to arbitration as the 12 month time frame for such reference under cl. 14 had lapsed and the plaintiff was deemed to have abandoned the claim thereunder.

D **[12]** Clause 14 reads:

> All differences arising out of this policy shall be referred to the arbitration of some person to be appointed by both parties, or, if they cannot agree upon a single Arbitrator, to the decision of two
> E Arbitrators, one to be appointed in writing by each party, and in case of disagreement between the Arbitrators to the decision of an Umpire who shall have been appointed in writing by the Arbitrators before entering on the reference and an Award shall be a condition precedent to any liability of the company or any
> F right of action against the company. If the company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within 12 calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable
> G hereunder.

[13] On 15 July 2003, plaintiff's solicitors informed defendant's solicitors that the plaintiff was entitled to refer the dispute to arbitration, because the 12 month time frame contained in cl. 14
H was void and unenforceable, being contrary to s. 29 of the Contracts Act 1950 ("s. 29") read with s. 6(1)(a) of the Limitation Act 1953 ("s. 6(1)(a)").

[14] As the defendant still maintained the position that the 12
I month time frame under cl. 14 is valid and that the dispute could not be referred to arbitration, the plaintiff filed the originating summons seeking the aforesaid order, and costs.

[15] On 22 February 2005, the High Court dismissed the plaintiff's originating summons with costs. Hence this appeal.

Arbitration Clause

[16] In the instant appeal, learned counsel Dato' Cecil Abraham (Dato' Sathaburan and Mr. Sunil Abraham with him) reiterated for the plaintiff that the arbitration clause, cl. 14 is void, being contrary to s. 29 read with s. 6(1)(a) and so plaintiff's contractual rights to refer to arbitration after the 12 month time frame remains unaffected. In support thereof, he cited the following authorities:

(1) *New Zealand Insurance Co. Ltd v. Ong Choon Lin* [1992] 1 MLJ 185 SC (which, he added, the learned High Court judge has misread);

(2) *J & Wong Logging Contractor v. Arab Malaysian Eagle Assurance Bhd* [1993] 1 LNS 2 HC; and

(3) *MBF Insurans Sdn Bhd v. Lembaga Penyatuan Dan Pemulihan Tanah Persekutuan (FELCRA)* [2007] 6 CLJ 639 CA.

[17] The response of defendant's learned counsel Mr. Sreether Sundaram is that:

(1) Clause 14 is a valid standard "*Scott v. Avery* clause", relying on *Scott v. Avery and other*s [1843-60] All ER 1 HL; and

(2) The 20 months from 9 November 2001 (the disclaimer date) to 1 July 2003 (the date on which the plaintiff purported to invoke cl. 14) had exceeded the 12 month time frame agreed thereunder, and so the plaintiff is deemed to have abandoned its claim, relying on:

   (a) Exceptions 1 and 2 to s. 29;

   (b) s. 28 of the Arbitration Act 1952 ("s. 28");

   (c) *Malaysia National Insurance Sdn. Bhd v. Meraslam Alafdin* [1982] CLJ 300; [1982] CLJ (Rep) 223 FC; and

   (d) *Majlis Perbandaran Petaling Jaya v. JF Industrial Products & Supplies Sdn Bhd* [1998] 2 CLJ 22 CA.

[18] The learned High Court judge held, *inter alia*, that:

(1) cl. 14 is valid, and so the plaintiff was barred by the 12 month time frame agreed thereunder; and

(2) *New Zealand Insurance Co. Ltd, supra*, is distinguishable as condition 19 therein had restricted "the time to file a matter in court as opposed to a reference to arbitration".

[19] In the light of the decision of the High Court and the respective submissions in the instant appeal, the question for determination is:

> Upon a true construction of s. 29 of the Contracts Act 1950, Exceptions 1 and 2 thereto, s. 6(1)(a) of the Limitation Act 1953, and s. 28 of the Arbitration Act 1952, is the arbitration clause, clause 14 (which the parties to the insurance policies have agreed to incorporate as a term to prescribe the 12 month time frame within which to refer their dispute to arbitration) void?.

[20] At this juncture, it is pertinent to consider the three authorities cited for the plaintiff, *viz*:

(1) *New Zealand Insurance Co. Ltd, supra.*

(a) The insured purchased a fire insurance policy by which the insurance company agreed to indemnify the insured against loss or damage occasioned by fire to the property situated in the premises of the insured. The policy was subsequently renewed. During the renewed currency of the policy, a fire occurred on the premises. Some 17 months after the fire and beyond the 12 month period contained in condition 19 of the policy, the insured filed a *suit* for contractual indemnity pursuant thereto. The insurance company raised the defence, *inter alia*, that the insured's claim was barred by condition 19 which reads: "In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration". Condition 19 therefore gives the insured two options to make a claim under the policy *viz* either by way of action in court or reference to arbitration. The insured preferred court action. In the High Court, Peh Swee Chin J (later FCJ) agreed with the insured's contention that condition 19 was rendered void by s. 29 and gave judgment for the insured as the suit was filed well within the six years prescribed in s. 6(1)(a). On appeal, the Supreme Court in a judgment

delivered by LC Vohrah J (as he then was) reaffirmed that condition 19 has contravened s. 29 and is void, as it clearly limited the time within which the insured could enforce his rights under s. 6(1)(a);

(b) It is necessary to ascertain the true *ratio decidendi* enunciated by the Supreme Court:

(i) In Court, parties to the suit have not pleaded or ventilated the issue of arbitration. The insurance company's defence at the trial was based on the 12 month bar contained in condition 19. That defence was dismissed by the High Court. In the Supreme Court, the insurance company's defence under condition 19 re-emerged, *inter alia*, as a substantive ground of appeal. The Supreme Court reaffirmed the decision of the High Court and, on the basis of s. 29 read with s. 6(1)(a), struck down condition 19 as void. While it is true that condition 19 expressly stated "action or arbitration", the insured did not refer the dispute to arbitration but preferred court action. The parties' pleadings (by which the parties are bound), the issues raised in counsel's contentions and the judgment of the Supreme Court conclusively show no trace or *iota* of any time frame for reference to arbitration at all.

(ii) The crux of the case concerns the commencement of the insured's suit in an ordinary court of law, and so the Supreme Court naturally applied the general rule embodied in s. 29 read with the limitation period of six years under s. 6(1)(a).

(iii) Had the Supreme Court judgment been concerned with the time frame for reference to arbitration, such as cl. 14 in the instant appeal, the parties' pleadings and their arguments would certainly have set out this critical issue for specific consideration and determination by the Supreme Court, in which event, not only the general rule embodied in s. 29 but also exceptions 1 and 2 thereto regulating arbitration would undoubtedly have been brought into focus. However, that had not been the case before the Supreme Court. The time frame to refer a dispute to arbitration has never been within the contemplation

of the parties, their respective counsel and the Supreme Court. In the circumstances, it is crystal clear that the *ratio* is in relation to the commencement of an action in an ordinary court of law to which the 6 year limitation period prescribed in s. 6(1)(a) applied.

(2) *J & Wong Logging Contractor, supra.*

(a) The plaintiff had insured two units of tractors with the defendants under an equipment insurance policy. During the currency of the policy, one of the tractors was accidentally damaged. The plaintiff lodged a claim pursuant to the equipment policy, but the defendant rejected the claim, contending, *inter alia*, that the accident did not come within the terms of the policy. After unsuccessful negotiations between the parties, the plaintiff filed a summons in the Sessions Court for loss or damage under the policy, and wrote to the defendant asking whether the defendant would agree to waive condition 11 which reads:

> All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in differences or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the arbitrators do not agree of an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company.
>
> If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

(b) The plaintiff then filed an originating summons under s. 28 of the Arbitration Act 1952 ("s. 28") seeking an extension of time beyond the 12 months within which to give notice to appoint an arbitrator(s) pursuant to cl. 11. On the preliminary question of whether the High Court has

jurisdiction to consider the plaintiff's originating summons in view of the Supreme Court judgment in *New Zealand Insurance Co. Ltd, supra*, Steve Shim J (later CJ (S&S) held that:

(i) as the insured has failed to refer the dispute to arbitration, no right of action can arise in the Sessions Court under the policy, and the High Court cannot entertain the merits of the plaintiff's originating summons as cl. 11 requires a reference to arbitration as a condition precedent: and

(ii) the stipulation in cl. 11 (that such reference to arbitration shall be done within 12 months from the insurance company's disclaimer of liability, otherwise the insured's claim shall be deemed to have been abandoned and shall not be recoverable) is void being in contravention of the relevant portion of s. 29 "which limits the time within which he may enforce his rights", read with s. 6(1)(a).

(3) *MBF Insurans Sdn. Bhd, supra*.

The relevant endorsement in a guarantee reads: "This guarantee will expire on 14 June 1991. Claims if any, must be received on or before that date." The guarantee was provided by the appellant insurance company to pay the respondent a sum of RM22,017 on demand by the respondent in respect of the contractor's works. As the contractor had failed to perform and complete the works, the respondent issued notices to the contractor on 4 June 1991. The respondent then sent a letter of demand to the appellant on 21 June 1991 ie, seven days after 14 June 1991 (the date of expiry of the guarantee). The appellant rejected the claim on the ground that the claim was late. The respondent then filed an action in the Magistrate's Court to recover the said sum against the appellant. The Magistrate's Court dismissed the claim on the ground that it was made out of time, after the expiry of the guarantee. On appeal, the decision of the Magistrate's Court was reversed by the High Court on the ground that the endorsement contravened s. 29, being an attempt to contract out of the Limitation Act 1953. The decision of the High Court was affirmed by the Court of Appeal. Three separate judgments were delivered. Gopal Sri Ram, JCA, with whom Hasan Lah, JCA, agreed, treated the crux as one of

construction and construed the endorsement *contra proferentum* ie, against the insurance company while Suriyadi, JCA followed *New Zealand Insurance Co. Ltd, supra*, and held that the endorsement contravened s. 29 and s. 6, and hence void.

[21] From the above analysis, it is abundantly clear to me that the aforesaid three authorities share the following common denominators:

(1) they concern the commencement of actions in ordinary courts of law and have nothing to do with references of disputes to arbitration;

(2) the provisions of exceptions 1 and 2 to s. 29 were neither pleaded nor ventilated in all the three authorities and so, these exceptions could not have been and indeed were actually not judicially considered by all the courts there; and

(3) they do not support the contention advanced for the insured.

[22] The bringing of an action in an ordinary court of law is readily distinguishable from a reference of a dispute to arbitration. A contract which incorporates an arbitration clause, such as cl. 14, to refer the parties' dispute to arbitration within a specified period as agreed by the parties, is a contract *sui generis*. The hallmark of arbitration is characterised by the autonomy of the parties. By way of agreement, the parties have an unfettered choice, not only to refer their dispute to arbitration and to choose their own arbitrators or umpires, but also to prescribe the time frame for such reference. Their intention is to sustain the mechanism of alternative dispute resolution by way of arbitration and not court action. Their desire is to place arbitration under their exclusive control. They hope to achieve eg, speed in the hearing and determination of their dispute. Different considerations would then apply to an arbitration clause prescribing a time frame such as that expressly agreed in cl. 14. It is a product of the doctrine of freedom of contract and would attract the application of the specific provisions expressly set out in exceptions 1 and 2 to s. 29, so that the general rule embodied in s. 29 would give way to these two exceptions.

[23] The intention of the parties expressed in the arbitration clause merits consideration now. Under cl. 14, *supra*, the parties herein have agreed that:

(1) Any difference ie dispute arising from the policies shall become the subject matter of reference to arbitration wherein the appointment of arbitrator(s) shall be in accordance with the specific provisions expressly contained therein; and

(2) In the event that the insurance company (ie, the defendant herein) disclaims liability thereunder, as in the instant appeal, the insured (ie, the plaintiff herein) has the contractual obligation to refer the claim to arbitration within 12 calendar months from the date of the disclaimer; otherwise the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable under the policies.

[24] The first limb of cl. 14 is intended to exclude the jurisdiction of the ordinary courts of law whenever a dispute arises between the contracting parties. It vests in the arbitrator(s) the jurisdiction to hear and determine the dispute by way of reference to arbitration as an alternative dispute resolution. This arbitration clause is commonly known as the "*Scott v. Avery* clause" which is derived from the celebrated case of *Scott v. Avery, supra*. There, the House of Lords propounded the following trite principle:

> Parties cannot by contract agree to oust the jurisdiction of the courts to deal with their rights under a contract, but a term in a contract which provides that, in the event of a dispute arising, it shall be referred to arbitrators whose award shall be a condition precedent to any right of action in respect of the matters agreed to be referred is valid. This is so not only where the provision for arbitration relates merely to the quantum of damages due from one party to the other, but also where it is stipulated that other matters, eg, liability, shall be determined in the first instance by arbitrators.

[25] The above common law position has found statutory expression in the relevant portions of s. 29 and exceptions 1 and 2 thereto, as follows:

Common Law	**Statutory Expression**
Parties cannot by contract agree to oust the jurisdiction of the courts to deal with their rights under a contract	**29. Agreements in restraint of legal proceedings void.** Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary

tribunals, ... is void to that extent." It deserves to be noted that s. 29 also renders void any agreement "which limits the time within which he may thus enforce his rights".

A term in a contract which provides that, in the event of a dispute arising, it shall be referred to arbitrators ... is valid.

Exception 1

Saving of contract to refer to arbitration dispute that may arise.

This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, ...

Exception 2

Saving of contract to refer questions that have already arisen.

Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, ...

[26] As a general rule, s. 29 strikes down as void:

(1) any "agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals"; and

(2) any agreement "which limits the time within which he may thus enforce his rights".

[27] The two expressions in quotes must be construed in the context in which they appear so as to take colour and precision: *noscitur a soccis*. They must also be construed conjunctively with the bringing of actions, within six years, under s. 6(1)(a) as set out below:

Limitation of actions of contract ...

6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

(a) Actions founded on a contract ... .

[28] In my view, the expression "ordinary tribunals" generally in s. 29 means the ordinary courts of law, as s. 29 does not render illegal any contract by which parties have agreed to refer their dispute to arbitration under the exceptions 1 and 2. Actions to be brought under s. 6(1)(a) are actions commenced in ordinary courts of law and not by way of reference to arbitration. Section 6(1)(a) neither affects nor applies to the freedom of the parties to refer a dispute to arbitration by incorporating an arbitration clause in an agreement for the purpose of vesting jurisdiction in an arbitrator(s) to hear and determine a dispute between contracting parties, as has been done in cl. 14. Such an arbitration clause to refer a dispute to arbitration may validly specify a period which abridges or for that matter even enlarges the time bar under s. 6(1)(a). This is because s. 6(1)(a) must be read with s. 29 exception 2 which specifically states that it shall not affect "any law as to references to arbitration". The law as to references to arbitration is to be found in the Arbitration Act 1952 (now the Arbitration Act 2005) which I shall proceed to consider now.

Section 28 Arbitration Act 1952

[29] The validity of cl. 14 is given statutory recognition in s. 28 of the Arbitration Act 1952 ("s. 28") which vests the High Court with the power to extend the time for the purpose of referring a dispute to arbitration after the expiry of the prescribed 12 month time frame. Section 28 reads:

Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given, or an arbitrator is appointed, or some other step to commence arbitration proceedings is taken, within a time fixed by the agreement and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to any written law limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper.

[30] It is plain that cl. 14 comes within the ambit of the expression "where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred" in s. 28. The time frame stipulated in cl. 14 may upon the expiry thereof be extended by the High Court on grounds of undue hardship.

[31] Section 28 has been successfully invoked by the insured for the purpose of obtaining an extension of time in High Court in both *Malaysia National Insurance Sdn. Bhd, supra*, and *Majlis Perbandaran Petaling Jaya, supra*. However, on appeal, the extension in these two cases had subsequently been set aside by the Federal Court and Court of Appeal, respectively. Be that as it may, the proceedings in these courts for extension of time under s. 28 is clear evidence of the validity of the arbitration clause such as cl. 14.

[32] Section 28 has now been re-enacted and re-worded in s. 45 of the Arbitration Act 2005 ("s. 45"). In other words, Parliament has consistently reaffirmed the freedom of the contracting parties to agree in an arbitration agreement for arbitral proceedings to be commenced within the time specified in the agreement, together with the vesting of discretionary power in the High Court to grant extension thereto. For completeness, s. 45 provides as follows:

> **45. Extension of time for commencing arbitration proceedings.**
>
> Where an arbitration agreement provides that arbitral proceedings are to be commenced within the time specified in the agreement, the High Court may, notwithstanding that the specified time has expired, extend the time for such period and on such terms as it thinks fit, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused.

"Law Of Limitation" (1995)

[33] My view that cl. 14 has been not rendered illegal by s. 29 but instead has been validated by exceptions 1 and 2 thereto may also be found in *"Law of Limitation"* (1995) by Associate Professor Choong Yeow Choy, where, at p. 166, the following passage appears:

> If the terms of an agreement between the parties to a contract contain a condition which provides for reference of a dispute to arbitration within a specified time period, then such dispute must be referred to arbitration within the time specified. A typical term in an insurance policy would provide that if the insurance company should disclaim liability to the insured for any claim, such a claim must be referred to arbitration within 12 calendar months from the date of such disclaimer. Where such a claim is not referred to arbitration within the specified time period, the claim would then be deemed to have been abandoned and should not thereafter be recoverable.

[34] At pp. 169 and 170, *ibid*, the learned author poses an almost identical question: "If a condition of a contract provides that a claim is required to be referred to arbitration within a specified time period failing which such claim will be deemed to have been abandoned and shall not thereafter be recoverable, would such a condition contravene s. 29 of the Contracts Act 1950?". He referred to s. 29 and gave the answer in the negative on the basis of exceptions 1 and 2 thereto, thereby viewing the arbitration clause such as cl. 14 containing the 12 month time frame as valid.

Conclusion

[35] The learned High Court judge has not misread the Supreme Court judgment in *New Zealand Insurance Co. Ltd, supra*, and was correct in holding that cl. 14 is valid.

[36] My answer to the above question for determination is in the negative. Hence, this appeal is dismissed with costs and the decision of the High Court is affirmed. Deposit to the respondent on account of taxed costs.

Heliliah Mohd Yusof JCA:

[37] The main issue in this appeal is the validity of cl. 14 which has been incorporated in two insurance policies, meaning two contracts of insurance. Clause 14 is a dispute settlement mechanism. Clause 14 in each contract indicates that the parties have agreed that arbitral proceedings must be commenced within a time shorter than that allowed by the Limitation Act 1953.

[38] Clause 14 itself could be read in two parts. The first part indicates that all differences arising out of the policy shall be referred to arbitration and an award shall be a condition precedent to any liability of the company or any right of action against the

company. The second part enables the insuring company to disclaim liability in which event the assured has an obligation within 12 calendar months from the date of the disclaimer to have the matter referred to the arbitration according to the provision stated in the same clause, and further in the event that the assured (the appellant in this appeal) fails to do so the claim shall "for all purposes be deemed to have been abandoned". Thus when the insurance company itself acts to disclaim liability that itself is a specific difference arising out of the policy.

[39] The requirement under that clause is that the insured in the event of a disclaimer is also to refer the matter to arbitration within twelve months from the date of the disclaimer.

[40] In this case this was not done by the appellant. Instead after a period of 20 months after the appellant's claim was repudiated on 1 July 2003 the appellant sought to refer the matter pursuant to s. 12 of the Arbitration Act 1952 (Act 1952), which has been superseded by the Arbitration Act 2005. Nevertheless for the purposes of this appeal the applicable Act is still the 1952 Act, since the originating summon filed by the appellant was done pursuant to the 1952 Act.

[41] In doing so the appellant has in effect chosen to disregard the 12 calendar months stipulated under cl. 14 on the ground that it runs contrary not only to s. 29 of the Contracts Act 1950 (CA 1950) but also s. 6(1)(a) of the Limitation Act 1953 (LA 1953). On that basis also the court is being requested to strike down cl. 14.

[42] My learned brother Low Hop Bing JCA has addressed the issue concerning the statutory recognition in the form of Exception 1 to s. 29 whereby a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration is not rendered illegal. This exception spells out that when parties resort to refer disputes arising between them no question therefore should arise concerning the matter being against public policy.

[43] In invoking s. 12 of the 1952 Act, the appellant is in effect stating that the 12 months period specified in cl. 14 should be treated as inapplicable purportedly on the grounds of its invalidity. In *Board of Trade v. Steel Brothers & Co.* [1952] 1 Lloyds Report 87 per Morris LJ in the course of interpreting such a clause suggests that it should be narrowly construed when he stated:

> There is clear authority for the proposition that, if a party to contract wishes to exclude the ordinary consequences that would flow in law from the contract that is making he must do so in clear and unambiguous terms.

[44] In this appeal there is no question of any ambiguity regarding cl. 14 in both the contracts of insurance. It is also further noted that the decision in *J & Wong Logging Contractor v. Arab Malaysian Eagle Assurance Bhd* [1993] 1 LNS 2 appears to lean in favour of the appellants where a cl. 11 which was being construed is very similar to cl. 14 in the present appeal. The relevant statement of Steve Shim J (as he then was) is as follows:

> ... I am of the view that clause 11, in particular the second limb therein, of the equipment insurance policy, to the extent in which it has limited the time within which the plaintiffs are allowed to enforce their rights in court, is void by reason of the provisions of s. 29 of the Act. It has the effect of restricting the plaintiff's statutory period for bringing an action under s. 6 of the Limitation Act 1953.

[45] In my view however such a clause having been incorporated cannot simply be disregarded. The court here is not addressing the issue whether there has been caused a fundamental breach of the term of the policies of insurance or whether the respondent has no ground to dispute the liability. The court is simply being asked to state that cl. 14 should be disregarded as it is to be considered as contrary to s. 29.

[46] In the *"M. Eregli"* [1981] 2 Lloyd's Law Report 169 Kerr J had to address the interpretation of such a clause. In that case the clause was as follows, *inter alia*:

> All disputes ... arising out of this contract shall unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London ... one to be appointed by each of the parties with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimants' arbitrator appointed within nine months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred ... .

[47] The statement that is to be referred to is as follows per Kerr J at p. 173:

> Where an arbitration clause contains a time limit barring all claims unless an arbitrator is appointed within the time limited, it seems to me that the time limit can only be ignored on the ground that there is no dispute between the parties if the claim has been admitted to be due and payable. Such an admission would, in effect, amount to an agreement to pay the claim and there would then clearly be no further basis for referring it to arbitration or treating it as time barred if no arbitrator is appointed. But if, as here, a claim is made and is neither admitted nor disputed, but simply ignored, then I think that the time limit clearly applies and that the claimant is **obliged** (subject to any possible extension of time) to appoint an arbitrator within the time. The fallacy in the plaintiff's argument can be seen at once if one considers what would have been the position if the plaintiffs had in fact purported to appoint Mr. Barclay as their arbitrator with the time limit of nine months. They could clearly have done so, and indeed any commercial lawyer or businessman would say that this is what they should have under the clause to enforce their claim. Arbitrators are appointed every day by claimants who believe – right or wrongly – that their claim is indisputable. However on the plaintiff's own argument Mr. Barclay would have had no jurisdiction, since then – as they now say no "dispute" to which the arbitration clause could have applied. In my view this argument is obviously unsustainable.

[48] It may well be contended that the circumstances in the appeal are slightly different in that it would here be a disputed claim or disclaimer. Nevertheless in my view the same approach should be applied. The parties have agreed by the terms of the agreement the mechanism by which dispute is to be resolved. The proper approach should also be that it is arguable that time limitation clauses being a beneficial feature in commercial contracts are capable of being upheld. It would enable parties to draw a time at a much earlier stage than the limitation statutes allow. I would therefore echo my learned brother's reasoning in respect of party autonomy.

[49] The court should resist parties going back on what they have agreed. In this case cl. 14 indicates that if steps are not taken within the time frame prescribed therein then the "claim for all purposes be deemed to have been abandoned and shall not there after be recoverable hereunder". The words "then the claim for all purposes be deemed to have been abandoned" in their ordinary sense clearly show a waiver of the claim if the claim is not "within 12 calendar months from the date of such disclaimer have been referred to arbitration".

[50] In the final analysis I would state this. The appellant is not in a position to resist the conditions inserted in the contract which impose obligations on him because if he were he would also be in a position to take advantage of his own wrong. I agree with the learned counsel for the respondent that s. 45 of the current Arbitration Act 2005 which was in force with effect from 15 March 2006 should have been resorted although it is noted here that the originating summons was filed on 8 November 2003 under s. 12 of the 1952 Act that is the previous Act. Section 45 is the equivalent of s. 28 of the superseded Arbitration Act.

[51] I agree with my learned brother Low Hop Bing JCA that this appeal accordingly is dismissed with costs.

Abdul Malik Ishak JCA:

Introduction

[52] I have read the judgment of my learned brother Low Hop Bing, JCA and agree with the views he has expressed. The appeal should be dismissed with costs. The decision of the High Court is hereby affirmed. Deposit should rightly go to the respondent on account of taxed costs. I wish to write a separate but supporting judgment and I shall do so now. It is necessary to set out, briefly, the relevant facts of this appeal.

The Relevant Facts

[53] Two insurance policies were issued by the respondent to the appellant, namely:

(a) a Money Insurance Policy indemnifying the appellant for the maximum sum of RM5 million; and

(b) a Burglary Insurance Policy indemnifying the appellant for the maximum sum of RM1 million.

[54] These two insurance policies, for convenience, will hereinafter be referred to as "the policies".

[55] On 4 February 2001, the appellant claimed to have suffered a loss covered by the policies.

[56] On 9 November 2001, the respondent repudiated the appellant's claim.

[57] On 1 July 2003, after a delay of 1 year 7 months 22 days equivalent to 19 months 22 days calculated from the date of the respondent's repudiation to 1 July 2003, the appellant sought to refer the dispute to arbitration.

[58] On 11 July 2003, the respondent informed the appellant that since the appellant had failed to refer their differences to arbitration within the 12 calendar months period pursuant to cl. 14 of the policies, the appellant was deemed to have abandoned the claim.

[59] Interestingly, there was an attempt at settlement that fell through. The offer of settlement came from the respondent. It was on 9 November 2001 when the respondent's solicitors, namely, Messrs Murali B. Pillai & Associates withdrew the respondent's offer of a settlement and forthwith disclaimed liability.

[60] Clause 14 of the policies play an important role in this appeal. It is ideal to reproduce that cl. 14. It is worded in this manner (see pp. 102 and 121 of the appeal record):

> All differences arising out of this Policy shall be referred to the arbitration of some person to be appointed by both parties, or if they cannot agree upon a single Arbitrator, to the decision of two Arbitrators, one to be appointed in writing by each party, and in case of disagreement between the Arbitrators, to the decision of an Umpire who shall have been appointed in writing by the Arbitrators before entering on the reference, and an Award shall be a condition precedent to any liability of the Company or any right of action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within 12 calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

[61] On 8 November 2003, the appellant filed an originating summons under s. 12 of the Arbitration Act 1952 (Act 93) for the purpose of moving the High Court to appoint an arbitrator to arbitrate the differences between the appellant and the respondent.

[62] On 22 February 2005, the High Court dismissed the appellant's originating summons. Hence, the appeal before us.

Arguments of the parties

[63] For the appellant, it is argued that cl. 14 of the policies is invalid because it contravenes s. 29 of the Contracts Act 1950 (Act 136). Flowing from that it is argued that the time limit prescribed in cl. 14 of the policies for the differences between the parties to be referred to arbitration is also invalid and, consequently, the appellant is free to seek the appointment of an arbitrator under s. 12 of the Arbitration Act 1952 (Act 93). The appellant cites and relies heavily on the case of *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 MLJ 185, a decision of the then Supreme Court (hereinafter it will be referred to as the "New Zealand case").

[64] The pertinent part of the *New Zealand* case can be seen at p. 186 of the report where under Held (1), it summarised the *ratio* in this way:

> The condition that the action be commenced within a 12-month period from the date of the occurrence of the loss or damage was void by virtue of the imperative words of s. 29 of the Contracts Act 1950 as it clearly limited the time within which the respondent could enforce his right under s 6(1)(a) of the Limitation Act 1953.

[65] At this juncture, it would be appropriate to reproduce s. 29 of the Contracts Act 1950 (Act 136) and I shall do so now (excluding Exception 3):

> **29. Agreements in restraint of legal proceedings void.** Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.
>
> **Exception 1**
>
> **Saving of contract to refer to arbitration dispute that may arise.**
>
> This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in the arbitration shall be recoverable in respect of the dispute so referred.

Exception 2

Saving of contract to refer questions that have already arisen.

Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any law as to references to arbitration.

[66] I will now reproduce the relevant parts of s. 6(1) of the Limitation Act 1953 (Act 254):

6. Limitation of actions of contract and tort and certain other actions.

(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –

(a) actions founded on a contract or on tort.

[67] We are concerned here with an action founded on a contract.

[68] It is also ideal to reproduce s. 12 of the Arbitration Act 1952 (Act 93):

12. Power of High Court in certain cases to appoint an arbitrator or umpire.

In any of the following cases:

(a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

(b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;

(c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him;

(d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy,

> any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

[69] Another authority relied upon by the appellant was the case of *J & Wong Logging Contractor v. Arab Malaysian Eagle Assurance Bhd* [1993] 1 LNS 2 (hereinafter referred to as the "*JW* case"), a decision of the Sibu High Court. This authority followed the *New Zealand* case. And so it is argued that cl. 14 of the policies is invalid and the appellant is entitled to rely on s. 12 of the Arbitration Act 1952 (Act 93) and apply to the High Court to seek the appointment of an arbitrator.

[70] The respondent's stand is this:

(a) that the *New Zealand* case can be distinguished from the present appeal;

(b) that the *ratio* in the *New Zealand* case cannot apply to the present appeal;

(c) that the clause in the *New Zealand* case are different from cl. 14 of the policies and, consequently, s. 29 of the Contracts Act 1950 (Act 136) cannot invalidate cl. 14 of the policies;

(d) that the High Court judge in the *JW* case was not made aware of the distinctions between the clause in the *New Zealand* case and cl. 14 of the policies;

(e) that the High Court judge in the *JW* case was not made aware of the two (2) exceptions to s. 29 of the Contracts Act 1950 (Act 136) which expressly exclude the operation of s. 29 of the Contracts Act 1950 (Act 136) from applying to those clauses like cl. 14 of the policies;

(f) that since the appellant was out of time, the appellant is not entitled to apply for the appointment of an arbitrator under s. 12 of the Arbitration Act 1952 (Act 93), rather the

A appellant should have applied under s. 28 of the Arbitration Act 1952 (Act 93) for an extension of time to appoint an arbitrator; and finally

(g) that by virtue of s. 1(2) of the Contracts Act 1950 (Act 136) B read together with the two exceptions in s. 29 of the Contracts Act 1950 (Act 136), it is argued by the respondent that cl. 14 of the policies do not offend s. 29 of the Contracts Act 1950 (Act 136) and for that reason cl. 4 of the policies cannot be rendered invalid.

C

Analysis

[71] It must be recalled that the appellant had on 8 November 2003 filed an originating summons seeking the appointment of an arbitrator under s. 12 of the Arbitration Act 1952 (Act 93) after D the expiration of the 12 calendar months period in contravention of cl. 14 of the policies following the respondent's disclaimer of liability on 9 November 2003 (the originating summons can be seen at pp. 35 to 36 of the appeal record). The High Court judge who heard the originating summons dismissed it and held that E cl. 14 of the policies is valid and that the appellant was barred by the 12 calendar months time frame. The High Court judge also held that the *New Zealand* case can readily be distinguished. At p. 27 of the appeal record, the High Court judge had this to say:

F > Now as to the effect of the *New Zealand*'s case, I am in agreement with counsel for the defendant that the *ratio* in the *New Zealand*'s case can be distinguished. The clause in the *New Zealand*'s case concerned an attempt by the plaintiff to introduce an absolute bar to a civil action by the defendant in restricting the time to file a matter in court as opposed to a reference to G arbitration. Therefore the court had rightly interpreted that clause 19 would be invalidated by virtue of section 29 of the Contracts Act.

[72] Now, cl. 19 of the fire policy in the *New Zealand* case is H worded in this fashion (see p. 191 of the MLJ report):

> In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

I

[73] Whereas cl. 14 of the policies is worded differently as reproduced earlier.

[74] I am of the considered view that cl. 14 of the policies is a *Scott* and *Avery* clause following the case of *Scott v. Avery And Others* [1843-60] ALL E.R. Rep. 1, H.L.

[75] In *Scott v. Avery And Others (supra)*, the House of Lords held that an arbitration clause did not have the effect of ousting the jurisdiction of the courts. It was therefore legally binding on the parties to the contract. The plaintiff, in *Scott v. Avery And Others (supra)*, sued on the policy of insurance containing the following provision (see p. 3 of the report, the relevant parts only):

> [T]hat no member ... shall be entitled to maintain any action at law or suit in equity on his policy, until the matters in dispute shall have been referred to and decided by, arbitrators, ... and the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.

[76] The insurers in *Scott v. Avery And Others (supra)* applied for a stay of the proceedings on the ground that the dispute between the insured and the insurer had not been referred to arbitration. *Inter alia*, the plaintiff there contended that the agreement was illegal as it intended to oust the jurisdiction of the courts. Their Lordships decided that the clause did not have the effect of ousting the jurisdiction of the courts and that such a provision was perfectly legal. Lord Campbell delivering a separate judgment had this to say at pp. 6 to 7 of the report:

> Is there anything contrary to public policy in saying that the company shall not be harassed by actions to be brought against them, the costs of which might be ruinous, but that any dispute that arises shall be referred to a domestic tribunal, which may speedily and economically determine the dispute? I can see not the slightest ill consequence that can flow from such a liberty, and I see great advantage that may arise from it. Public policy, therefore, seems to me to require that effect should be given to the contract.

[77] So long as an award by an arbitrator is a condition precedent to any liability of the insurer or any right of action against the insurer it would fall under the category of the *Scott and Avery* clause. This very requirement is certainly present in cl. 14 of the policies.

[78] My learned brother Low Hop Bing, JCA has rendered an excellent analysis of the following authorities and I wholeheartedly agree with his approach:

A (a) the *New Zealand* case;

(b) the *JW* case; and

(c) *MBF Insurans Sdn. Bhd v Lembaga Penyatuan Dan Pemulihan Tanah Persekutuan (FELCRA)* [2007] 6 CLJ 639 CA
B (hereinafter referred to as *"MBF Insurans"*).

[79] However, I wish to say a few words about the *New Zealand* case. LC Vohrah J, delivering the judgment of the then Supreme Court in the *New Zealand* case, referred to a number of
C Indian and Malaysian case authorities. Since our Malaysian Contracts Act 1950 (Act 136) is modelled after the Indian Contract Act 1872 which in turn was a codification of the English common law at the time of its introduction, it is quite understandable that his Lordship made reference to some Indian
D authorities cited by the learned counsel there, namely:

(a) *Hirabhai Narotamdas v. Manufacturers Life Insurance Co* [1912] 14 Bom LR 741;

(b) *Baroda Spinning & Weaving Co Ltd v. Satyanarayan Marine &*
E *Fire Insurance Co Ltd* [1914] AIR Bom 225;

(c) *Girdharilal Honuman Bux v. Eagle Star and British Dominions Insurance Co Ltd* [1924] AIR Cal 186;

(d) *G Rainey & Anor v. Burma Fire and Marine Insurance Co Ltd*
F [1926] AIR Rangoon 3;

(e) *AN Ghose v Reliance Insurance Co & Anor* [1924] AIR Rangoon 15;

(f) *Ruby General Insurance Co Ltd v. Bharat Bank Ltd & Ors* [1950] AIR (37) (East) Punjab 352; and

G (g) *Pearl Insurance Co v. Atma Ram* [1960] AIR Punjab 236.

[80] The Indian authorities were decided against the backdrop of s. 28 of the Indian Contract Act 1872 which is indentical with our s. 29 of the Contracts Act 1950 (Act 136).

H **[81]** The *New Zealand* case examined the clauses in these Indian authorities and I can do no better than to refer to them.

[82] *Baroda Spinning & Weaving Co Ltd v. Satyanarayan Marine & Fire Insurance Co Ltd (supra)*; *Girdharilal Honuman Bux v. Eagle*
I *Star and British Dominions Insurance Co Ltd (supra)*; and *G Rainey & Anor v. Burma Fire and Marine Insurance Co Ltd (supra)* carried the following clause:

> if the claim be made and rejected, and an action or suit be not commenced within three months after such rejection, all benefit under this policy shall be forfeited.

[83] While the case of *AN Ghose v. Reliance Insurance Co & Anor (supra)* contained the following clause:

> the insurance company should not be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim was subject of pending action or arbitration.

[84] Two Indian authorities, namely, *Ruby General Insurance Co Ltd v. Bharat Bank Ltd & Ors (supra)*; and *Pearl Insurance Co v. Atma Ram (supra)* carried the following clause:

> in no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

[85] In my judgment, these clauses as found in these Indian authorities are not *Scott and Avery* clauses for the simple reason that they do not share the same common elements as cl. 14 of the policies. And even though the clauses in the Indian authorities were held by the then Supreme Court in the *New Zealand* case to be invalid for contravening s. 29 of the Contracts Act 1950 (Act 136), yet cl. 14 of the policies being differently worded from the clauses in the Indian authorities or from cl. 19 of the fire policy in the *New Zealand* case, it remains intact and untouched by s. 29 of the Contracts Act 1950 (Act 136).

[86] The appellant submits that the decision of the then Supreme Court in the *New Zealand* case is clear and unequivocal in that it sets down a universal principle that parties cannot contract out of a statutory provision. Again, the appellant points out that the *New Zealand* case has since been followed by the *JW* case and *MBF Insurans*. And so, according to the appellant, the appellant is within its right to refer the dispute between the parties to an arbitrator within the 6 years' limitation period under s. 6(1)(a) of the Limitation Act 1953 (Act 254) notwithstanding that the 12 calendar months time period provided for in cl. 14 of the policies had expired.

[87] The appellant submits that the High Court judge failed to take into account what the then Supreme Court in the *New Zealand* case had said, namely:

(a) that as a general rule parties cannot by contract alter the statutory period of limitation, nor can they alter the statutory starting point of limitation because such a contract will be void;

(b) that cl. 19 of the fire policy in the *New Zealand* case is void by virtue of the imperative words of s. 29 of the Contracts Act 1950 (Act 136) because it clearly limits the time within which a party can enforce its right under s. 6(1)(a) of the Limitation Act 1953 (Act 254); and

(c) that the decision of *Chop Eng Thye Co v. Malaysia National Insurance Sdn Bhd* [1976] 1 LNS 15 which dealt with the similar issue of reference of a dispute to court or arbitration was decided *per incuriam*.

[88] It is submitted on behalf of the appellant that the High Court judge failed to recognise that the *New Zealand* case applies to arbitration cases where one party attempts to prohibit another party from referring a matter to arbitration within the 6 years limitation period but in excess of the stipulated 12 months time period in an arbitration clause.

[89] Again it is submitted on behalf of the appellant that Exception (1) and Exception (2) to s. 29 of the Contracts Act 1950 (Act 136) do not apply to the factual matrix of the present appeal. It is emphasised that these two Exceptions provide that an agreement to arbitrate in itself shall not be rendered illegal if the parties agree to refer their dispute to arbitration.

[90] The sting of the appellant's submission is this. That cl. 14 of the policies is contrary to both s. 6 of the Limitation Act 1953 (Act 254) and s. 29 of the Contracts Act 1950 (Act 136).

[91] The appellant submits further that the "proper procedure" that should be adopted would be along the following guidelines:

(a) the appellant refers the dispute to arbitration notwithstanding that the 12 calendar months time period has lapsed;

(b) the respondent is then entitled to argue that the appellant's claim is already out of time because no arbitration has been commenced within the 12 calendar months time period;

(c) the arbitrator will then decide on the jurisdictional objection raised by the respondent and if the arbitrator accepts the respondent's argument, an award will be handed down dismissing the appellant's claim; and

(d) by this procedure, both parties' contractual rights to arbitrate are preserved in accordance with cl. 14 of the policies.

[92] Flowing from all these, it is submitted that by refusing to allow arbitrators to be appointed pursuant to s. 12 of the Arbitration Act 1952 (Act 93), the High Court judge has usurped the role of the arbitrators and prematurely decided the substantive issues that may have been raised by the appellant or the respondent at the arbitration. In effect, it is submitted that the High Court judge has short-circuited the arbitration process and failed to give effect to the true intention of the parties to have the dispute between the parties resolved by way of an arbitral process.

[93] Finally, it is submitted by the appellant that the High Court judge is bound by the doctrine of *stare decisis* or binding precedent to dutifully follow the decision of the then Supreme Court in the *New Zealand* case and give effect to it accordingly.

[94] With respect, I cannot subscribe to the appellant's submissions. The purported *"proper procedure"* are certainly far-fetched. They do not take into account that the appellant had exceeded the 12 calendar months time frame.

[95] One may ask: what is a policy of insurance? Essentially, it is a contract and the rules governing contracts in general are applicable to a contract of insurance. Usually, a contract of insurance is made with reference to a specified event where the occurrence of which is uncertain. It is this uncertainty that forms the basis of the contract in that it insures against the risk of the occurrence of the specified event. Megarry VC in *Medical Defence Union Ltd. v. Department of Trade* [1979] 2 WLR 686 had this to say in regard to the characteristic of an insurance contract. This was what his Lordship said at p. 690 of the report (the relevant parts only):

> First, the contract must provide that the assured will become entitled to something on the occurrence of some event. ... Second, the event must be one which involves some element of uncertainty.

[96] At the end of the day, the construction of a policy of insurance is a question for the court to decide (*Clift v. Schwabe* [1846] 3 CB 437 (life insurance) per Parke B, at 469; and *Simond v. Boydell* [1779] 1 Doug KB 268 (marine insurance) per Buller J,

A at 277). And the principles of construction are the same as in the case of other contracts (*Robertson v. French* [1803] 4 East 130 (marine insurance) per Lord Ellenborough at 135; *Carr v. Montefiore* [1864] 5 B&S 408, Ex Ch (marine insurance); *Smith v. Accident Insurance Co* [1870] LR 5 Ex Ch 302 (accident insurance) B per Martin B, at 307; *West India Telegraph Co v. Home and Colonial Insurance Co* [1880] 6 QBD 51, CA (marine insurance) per Brett LJ at 58; and *Stewart v. Merchants Marine Insurance Co* [1885] 16 QBD 619, CA (marine insurance) per Lord Esher MR, at 626, 627).

C **[97]** Reverting back to the *New Zealand* case, it must be recalled that the defendant insurance company argued that because the plaintiff there had failed to file a suit within the 12 months after the disclaimer, the plaintiff there had completely and absolutely lost any right to file a civil suit. This argument by the defendant D insurance company was an attempt to introduce an absolute bar against the plaintiff there from filing a civil suit as opposed to seeking an appointment of an arbitrator like the instant appeal at hand.

[98] The main issue that the *New Zealand* case had to decide E was whether condition 19 of the fire policy was invalid for contravening s. 29 of the Contracts Act 1950 (Act 136) because it absolutely barred the assured from filing a civil suit or any claim whatsoever after the expiration of 12 months from the disclaimer.

[99] Here, before us, the issue is completely different. We have F to construe whether cl. 14 of the policies is invalid for contravening s. 29 of the Contracts Act 1950 (Act 136) because:

(a) it prescribes a time limit of 12 calendar months from the disclaimer, within which the appellant is required to refer the G matter to arbitration, and failing which the appellant is deemed to have abandoned its claim; and of crucial importance;

(b) it makes it as a condition precedent for the appellant to obtain an arbitrator's award to any liability or right of action against the respondent. H

[100] Comparing condition 19 of the fire policy in the *New Zealand* case with cl. 14 of the policies, the contrasts are quite remarkable.

I **[101]** What cl. 14 of the policies provide is this:

(a) it makes the award of an arbitrator as a condition precedent to any liability or right of action against the respondent insurance company;

(b) it prescribes a time limit of 12 calendar months from the date of such disclaimer, failing which;

(c) the assured appellant is deemed to have abandoned its claim.

[102] In construing cl. 14 of the policies, I am reminded of what Kelly CB said in *Stanley v. Western Insurance Co* [1868] LR 3 Ex Ch 71 at 73 that:

> The words of the policy are to be construed not according to their strictly philosophical or scientific meaning, but in their ordinary and popular sense.

[103] And according to Collins LJ in *Re George and Goldsmiths' and General Burglary Insurance Association Ltd* [1899] 1 QB 595, at 610:

> All I have to do is to look at the words which (the parties) have used, and try to give them their plain and common sense meaning.

[104] I have since perused through cl. 14 of the policies with a toothcomb and I have this to say. That the time limit for reference to arbitration is extendable by virtue of s. 28 of the Arbitration Act 1952 (Act 93) which enacts as follows:

> **28. Power of High Court to extend time for commencing arbitration proceedings.**
>
> Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given, or an arbitrator is appointed, or some other step to commence arbitration proceedings is taken, within a time fixed by the agreement and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to any written law limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper.

[105] It is the High Court that will decide to extend time, upon application by the appellant.

[106] And what cl. 14 of the policies do not provide is this:

(a) it does not limit the time within which the respondent could enforce its right under s. 6(1)(a) of the Limitation Act 1953 (Act 254) because the appellant assured is deemed to have abandoned its right and where one has abandoned one's right, it cannot be said that one's right has been limited;

(b) it does not prevent or prohibit the appellant from filing a civil suit, it simply makes the award of an arbitrator as a condition precedent to its liability; and

(c) it does not absolutely restrict the appellant from enforcing its right because, as I said, the time limit to refer the matter to arbitration is extendable by virtue of s. 28 of the Arbitration Act 1952 (Act 93) and it will not run counter to s. 29 of the same Act which enacts as follows:

> **29. Terms as to costs, etc.**
>
> Any order made under this Act may be made on such terms as to costs or otherwise as the authority making the order thinks just.

[107] My learned brother Low Hop Bing JCA in his analysis of the *New Zealand* case, the *JW* case and the *MBF Insurans* rightly pointed out that these three cases concerned actions that took place in ordinary courts of law and not by way of arbitration. His Lordship further said that Exceptions (1) and (2) to s. 29 of the Contracts Act 1950 (Act 136) were not pleaded nor ventilated in these three cases and, consequently, both the Exceptions were not judicially considered by the courts there. Here, before us, there is an affidavit supporting an application for the first appointment of an arbitrator affirmed by Wong Lee Seng dated 7 November 2003 as seen at pp. 64 to 68 of the appeal record particularly at para. 16 which categorically brings into sharp focus both s. 29 of the Contracts Act 1950 (Act 136) and s. 6(1) of the Limitation Act 1953 (Act 254). And that affidavit must have been read before the High Court judge.

[108] Clause 14 of the policies does not prohibit the commencement of a civil action after the 12 calendar months period nor does it limit the time within which the respondent could enforce its right under s. 6(1)(a) of the Limitation Act 1953 (Act 254). The said clause makes reference to an arbitrator's award as a condition precedent to liability and a prescribed time limit to refer the dispute to arbitration failing which the respondent is deemed to have abandoned its right.

[109] Whereas cl. 19 of the fire policy in the *New Zealand* case is entirely different. It categorically states that the defendant's liability to the plaintiff is wholly and irretrievably extinguished after the expiry of 12 months from the date of the disclaimer whether it be a civil action or a reference to arbitration. It is an absolute restriction and its stringency is not subject to the judicial evaluation and control afforded by s. 28 of the Arbitration Act 1952 (Act 93). This absolute restriction certainly runs foul of s. 29 of the Contracts Act 1950 (Act 136). But it is not the case with cl. 14 of the policies.

[110] It is my considered view that the then Supreme Court in the *New Zealand* case rightly held that cl. 19 of the fire policy as being invalidated by s. 29 of the Contracts Act 1950 (Act 136). If the then Supreme Court in the *New Zealand* case had decided otherwise the plaintiff there would have been absolutely barred from filing a civil suit and be left without any remedy whatsoever. The absolute restriction in cl. 19 of the fire policy in the *New Zealand* case is too stifling. The same is not true when construing cl. 14 of the policies.

[111] I reiterate that there is a leeway accorded to cl. 14 of the policies in that after the expiration of the 12 calendar months time period the appellant should have availed themselves of the statutory relief afforded by s. 28 of the Arbitration Act 1952 (Act 93) by applying before the High Court for an extension of time to appoint an arbitrator (*Majlis Perbandaran Petaling Jaya v. JF Industrial Products & Supplies Sdn Bhd* [1998] 2 CLJ 22 CA). Unfortunately, this was not done.

Conclusion

[112] The cardinal rule of construction has always been that the intention of the parties must prevail (*Drinkwater v. London Assurance Corpn* [1767] 2 Wils 363 (fire insurance) per Wilmot CJ, at 364; *Tarleton v. Staniforth* [1794] 5 Term Rep 695 (fire insurance) per

Lord Kenyon CJ, at 699; and *Braunstein v. Accidental Death Insurance Co* [1861] 1 B&S 782 (accident insurance) per Blackburn J, at 799). The parties must be bound by the terms and conditions of cl. 14 of the policies. The appellant cannot resile from it. As Lord Sumner said in *Yorkshire Insurance Co Ltd v. Campbell* [1917] AC 218, at 224, PC:

> *Prima facie* all the words which the policy contains ... are words of contract to which effect must be given.

[113] Having failed to take the necessary steps to abide by the agreed time frame in the insurance policies and having failed to avail itself of the statutory remedy provided for by s. 28 of the Arbitration Act 1952 (Act 93), there is nothing left for the appellant to cling onto.